

**IN THE SUPREME COURT OF MISSOURI**

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STATE EX REL. SPRINGFIELD UNDERGROUND, INC.,

Relator,

v.

THE HONORABLE J. MILES SWEENEY,

Respondent.

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**PETITION FOR WRIT OF PROHIBITION**

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**BRIEF OF RESPONDENT JUDGE SWEENEY AND  
PLAINTIFF IN THE UNDERLYING ACTION**

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## **OPINION BELOW**

This case involves the foreclosure of a mechanic's lien. The Honorable J. Miles Sweeney ("J" this motion was issued.

### **STATEMENT OF THE CASE**

Pittsburg Steel ("Pittsburg") supplied steel components to Springfield for Springfield's use in building conveyors for its underground mining operations in Springfield, Missouri. (Answer, ¶ 6).<sup>1</sup> Pittsburg fabricated and manufactured the steel at its plant in Kansas. (Answer, ¶ 6). When Springfield failed to pay Pittsburg, Pittsburg exercised its lien rights.

On or about May 15, 2001, Pittsburg served a Notice of Intent to File a Mechanic's Lien on John Griesemer, an authorized officer of Springfield. (Answer, ¶ 9). On or about June 4, 2001, Pittsburg filed its Statement of Mechanic's Lien with the Circuit Clerk of Greene County, Missouri. (Answer, ¶ 11). Pittsburg then filed a Petition to Foreclose on its lien on or about July 10, 2001. (Answer, ¶ 14).

Springfield filed a Motion to Dismiss/Motion for Summary Judgment, which was denied by Judge Sweeney. (Answer, ¶¶ 16, 18). Springfield then sought a Writ of Prohibition from the Southern District Court of Appeals which that Court denied. (Answer, ¶ 19). On or about July 29, 2002, Springfield filed a Petition for Writ of Prohibition with this Court. (*See* Petition for Writ of Prohibition).

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<sup>1</sup> Reference to Answer is the Answer filed by Judge Sweeney to the Petition for Writ of Prohibition filed by Springfield.

The Supreme Court of Missouri has commanded Judge Sweeney to show cause why a writ of prohibition should not issue ordering him to vacate his order of May 15, 2002, wherein Judge Sweeney denied Springfield's Motion to Dismiss/Motion for Summary Judgment. (Order of the Supreme Court, May Session 2002, dated August 27, 2002).

To assist this Court and opposing counsel, Judge Sweeney provided his arguments and authorities in conjunction with his Answer to Springfield's Writ of Prohibition. (*See Answer*). That Answer was filed with this Court on September 26, 2002. As the Court will recall, Judge Sweeney advanced numerous arguments in his original Answer. Rather than simply incorporating those arguments by reference herein, Judge Sweeney, for the ease of the Court in reviewing this matter, restates some of those arguments as part of his Response to Springfield's Brief. In addition to those arguments previously presented and now restated, Judge Sweeney is further providing additional arguments and authorities as to why the Writ of Prohibition should not be granted.

### **SUMMARY OF THE ARGUMENT**

This case involves the proper procedures taken by a trial court in denying a Motion to Dismiss/ Motion for Summary Judgment. A review of Springfield's Brief in relation to the issues before this Court clearly shows that prohibition is simply not appropriate here.

As this Court knows, the primary purpose of a writ of prohibition is to prevent the usurpation of judicial power. Mo. Rev. Stat. §531.010 (2002). Springfield ignores the fact that, under the law of this state, the purpose of prohibition is not to provide a remedy for all legal difficulties nor to serve as a substitute for an appeal. *State ex rel. Eggers v. Enright*,

609 S.W.2d 381, 382 (Mo. banc. 1980). Furthermore, a writ of prohibition does not lie as a remedy for grievances, such as in this case, which may be redressed in the ordinary course of judicial proceedings by other remedies provided by law. *State ex rel. Speer v. Grimm*, 599 S.W.2d 67, 69 (Mo. Ct. App. E.D. 1980). As the Court of Appeals noted in *Speer*, prohibition is rarely, if ever, appropriate in cases where summary judgment was denied. *See Speer*, 599 S.W.2d at 69, f.n.1 (“We find very few cases from other jurisdictions where appellate courts have determined that orders denying motions for summary judgment are subject to review by extraordinary writs such as certiorari, mandamus or prohibition”). Springfield has not advanced any reason, and there is no reason why this Court should ignore the general rule of law on this issue, by granting a Writ of Prohibition in this case.

Two elements must occur simultaneously for the issuance of an extraordinary writ: lack of jurisdiction and lack of an adequate remedy by appeal. *State ex rel. J.W. Martin v. Peters*, 649 S.W.2d 561, 563 (Mo. Ct. App. W.D. 1983), *citing State ex rel. Gray v. O’Leary*, 602 S.W.2d 473, 476 (Mo. Ct. App. 1980). Neither of these circumstances are present in this case. “Although appeal must provide an adequate remedy, the essential function of prohibition is to confine judicial activities within the limits of cognizable authority, preventing actions in want or excess of the court’s jurisdiction.” *Id.* Judge Sweeney clearly acted within the limits of his cognizable authority and never acted in excess of the Court’s jurisdiction. This is exemplified by the fact that under the law, actions in excess of jurisdiction must be clearly evident, “and there is a presumption of right action in favor of the trial judge.” *Id.* That “presumption of right action” in favor of Judge Sweeney in his denial of the Motion of Springfield are fatal to Springfield seeking this Writ.

Furthermore, a writ of prohibition should be used sparingly when reviewing an order denying a motion for summary judgment, limiting its use “to cases where extraordinary and compelling reasons exist to warrant such relief.” *State ex rel. Speer v. Grimm*, 599 S.W.2d 67, 69 (Mo. Ct. App. E.D. 1980). No such “compelling” or “extraordinary” reasons exist in this case and none have been advanced by Springfield to warrant the issuance of such a Writ by this Court.

In the present case, Springfield filed a Motion to Dismiss/Motion for Summary Judgment, which was denied by the Circuit Court. Missouri’s standards for reviewing a motion to dismiss are well established. “The facts averred in the pleading are assumed to be true and are construed liberally in favor of the [plaintiff].” *Johnson v. Kraft General Foods*, 885 S.W.2d 334, 335 (Mo. banc 1994). “A petition is sufficient to withstand a motion to dismiss for failure to state a claim if it invokes substantive principles of law entitling plaintiff to relief and alleges ultimate facts informing defendant of that which the plaintiff will attempt to establish at trial.” *Ritterbusch v. Holt*, 789 S.W.2d 491, 493 (Mo. banc 1990).

Likewise, the propriety of summary judgment is purely an issue of law. *Mobley v. Baker*, 72 S.W.3d 251, 256 (Mo. Ct. App. W.D. 2002). Summary judgment will only be granted if: (1) there is no genuine dispute of material fact, and (2) the movant is entitled to judgment as a matter of law. *ITT Commercial Fin. V. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 380 (Mo banc 1993). The law is very clear that a pleading states a claim for relief if there is *any* basis for relief within the facts plead, when viewed in the light most favorable to Pittsburg, the pleading party. *Yoeast v. Farm Credit Bank of St. Louis*, 832 S.W.2d 325, 328 (Mo. App. W.D. 1992) (emphasis added). The Court must review the record in the light



most favorable to Pittsburg, the party against whom judgment is sought, and the non-movant is given all benefit of reasonable inferences from the record. *ITT Commercial Fin.* At 376. Pittsburg's Petition clearly stated a basis for relief.

Springfield maintains that it was entitled to summary judgment at the trial court level for three reasons: (1) Pittsburg's notice of intent to file a mechanic's lien contains an incorrect location of the property where the conveyors were located; (2) Pittsburg has failed to limit its lien to three (3) acres as required by §429.010<sup>2</sup>; and (3) Pittsburg is not, and was not authorized to do business in the State of Missouri at the time it filed its statement of mechanic's lien with the Circuit Clerk of Greene County, Missouri, or at the time it filed its petition to enforce the mechanic's lien with the Circuit Court of Greene County, Missouri<sup>3</sup>.

Springfield has limited its argument in its Brief to its first contention; specifically its allegation that Pittsburg's lien contains an incorrect description of the property.

For the reasons set forth below, none of these reasons support either a Motion to Dismiss or a Motion for Summary Judgment and both were properly denied. The sole reason before this Court for consideration does not warrant this Court granting the extraordinary relief requested by Springfield.

## **ARGUMENTS AND AUTHORITIES**

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<sup>2</sup> The property in question herein lies within the city limits of Springfield, Missouri, and therefore, Pittsburg has properly complied with R.S.Mo. §429.010.

<sup>3</sup> Pittsburg is now currently authorized to do business in the State of Missouri, making Springfield's argument moot.

1. **SPRINGFIELD HAS WAIVED ALL ARGUMENTS NOT PRESENTED IN ITS POINTS RELIED ON.**

In its Brief and single Point Relied On, Springfield has only preserved a single argument; namely, Springfield contends that Pittsburg's lien contains an incorrect description of the property. Any other argument asserted by Springfield is, therefore, waived since issues not presented in its points relied on in the brief are abandoned and will not be considered by the reviewing court. *Boyer v. Grandview Manor Care Center, Inc.*, 793 S.W.2d 346 (Mo. 1990) (en banc.); *Green v. Miller*, 851 S.W.2d 553, 554 (Mo. Ct. App. W.D. 1993).

Springfield has mentioned in its brief a few arguments anecdotally and in passing. Since Springfield did not, however, rely on those arguments in its points relied on or in its argument, this Court should not consider any point other than the one issue Springfield preserved.

2. **PITTSBURG SUBSTANTIALLY COMPLIED WITH THE MECHANIC'S LIEN STATUTE SINCE PITTSBURG'S LIEN FILING ENABLED SPRINGFIELD TO IDENTIFY THE PREMISES INTENDED TO BE COVERED BY THE LIEN.**

Springfield alleges that Pittsburg incorrectly described the location of the property where the materials Pittsburg supplied to Springfield are located, and Springfield thus contends summary judgment in favor of Springfield is warranted. Springfield, however, misconstrues both the law and the purpose of the Mechanic's Lien Statute. Furthermore, Springfield overlooks the legal authority which allows Pittsburg to amend its lien to clarify

any such inaccuracy at any time up until the time judgment is rendered.

The mechanic's lien law is remedial in nature and is to be liberally construed. *Breckenridge Material Co. v. Byrnesville Const. Co., Inc.*, 842 S.W.2d 551, 552 (Mo. Ct. App. E.D. 1992). Section 429.080 R.S.Mo. (2002) states that a lien must contain "a true description of the property, *or so near as to identify the same, upon which the lien is intended to apply.*" (emphasis added). Substantial compliance with the statute is all that is necessary in order to secure its benefits, and "the description of the property need not be letter perfect." *Breckenridge* at 552. "[W]hen the rights of third parties are not involved, the description need only be sufficient to enable one familiar with the locality to identify the premises intended to be covered by the lien." *Id.* See also *Hertel Electric Co. v. Gabriel*, 292 S.W.2d 95, 99 (Mo. Ct. App. 1956) (emphasis added). In this case, the description used by Pittsburg clearly identified for Springfield the property "intended to be covered by the lien."

Furthermore, Springfield received actual notice of Pittsburg's mechanic's lien and Springfield does not and cannot deny that it received such actual notice. This is a key factor. Springfield asserts in its Brief that "in an action to enforce a mechanic's lien the burden is on the entity seeking to enforce the lien to prove *reasonable and substantial compliance* with the essential statutory requirements." See Springfield's Brief, p. 14 (emphasis added). Springfield attempts to confuse this standard by also alleging that strict compliance with the notice provision is always necessary. *Id.* In a recent decision, the Court of Appeals for the Eastern District stated that "the purpose of the [mechanic's lien] notice provision is to warn inexperienced property owners of the dangers which 'lurk' in the mechanics' lien statute."

*Bellon Wrecking & Salvage Co. v. Rohlfing*, 81 S.W.3d 703, 715 (Mo. Ct. App. E.D. 2002).

More importantly, that Court found that substantial compliance with the notice provisions of the statute was all that was required where the parties are businesspersons. *Id.* In the present case, both Springfield and Pittsburg are knowledgeable business entities and Pittsburg substantially complied with the statute's notice provision.

In the present case, Pittsburg fabricated steel, prepared it for shipment and then contacted Springfield, advising Springfield that the steel was ready for pick up. (Affidavit of Kirk Nelsen, attached as Exhibit B to Pittsburg's Response in Opposition to Springfield's Motion to Dismiss/Motion for Summary Judgment, ¶4 ("Nelsen Affidavit"). Springfield was solely responsible for arranging for the shipping, picking up the materials from Pittsburg at its plant, paying the carrier and delivering the steel to a location designated by Springfield for installation. (Nelsen Affidavit, ¶5). Once Springfield had its chosen carrier pick up the equipment from Pittsburg at Pittsburg's plant, Springfield then solely and exclusively determined where the product would be utilized on Springfield's property. (Nelson Affidavit, ¶5). As a result, Springfield had sole knowledge and control as to the ultimate location on its own property that the materials were used. Although Pittsburg was aware that the materials would be incorporated into and used as conveyors on Springfield's property, Pittsburg had no knowledge or control over where Springfield would locate on its property the steel fabricated by Pittsburg. (Nelsen Affidavit, ¶5).

Pittsburg filed a Statement of Mechanic's Lien with the Circuit Clerk of Greene County, Missouri on or about June 4, 2001. (*See* Pittsburg's Petition to Enforce and Foreclosure Upon Mechanic's Lien and for Damages). In its Lien, Pittsburg did not

arbitrarily describe property belonging to some stranger. The property described in the lien statement was a large tract of property owned by Springfield where Pittsburg believed the conveyors were located once incorporated into the property. Springfield's Motion to Dismiss/Motion for Summary Judgment alleges that Springfield's quarry operation is comprised of five separate tracts of land and that Pittsburg's Mechanic's Lien asserts that the materials were incorporated into Tract V when Springfield asserts that the materials were actually incorporated into Tract I. The five tracts are shown on a boundary survey that is attached as part of Exhibit E of Springfield's Motion to Dismiss/Motion for Summary Judgment. This survey, however, was a privately conducted survey prepared at Springfield's request. Pittsburg was not privy to, nor did it have access to, the private survey until Springfield filed its Motion to Dismiss/Motion for Summary Judgment. Simply stated, Springfield owns one large tract of land that it has internally, but secretly, contended that it has divided into five separate tracts in order to try to defeat the justifiable claim of Pittsburg by Springfield claiming that Pittsburg has filed a claim on the wrong property. Importantly, there is no public record of the division of these tracts. Pittsburg cannot be held to comply with the terms of a private survey of which it had no knowledge. Springfield has been given actual timely notice by Pittsburg of the lien which was placed on the property owned by Springfield and that notice is sufficient under the law of Missouri.

Even assuming, without admitting, that the property described in Pittsburg's Lien is inaccurate, the law is clear that any deficiencies in the property description can be cured by amendment at any time prior to judgment. *Hill Behan Lumber Co. v. Dinan*, 786 S.W.2d 904, 906 (Mo. Ct. App. E.D. 1990) *see also Paradise Homes, Inc. v. Helton*, 631 S.W.2d 51,

(Mo. Ct. App. E.D. 1981); *Hertel Electric Co.v. Gabriel*, 292 S.W.2d 95, 100 (Mo. Ct. App. 1956). Furthermore, it is prejudicial error to deny Pittsburg the right to amend the description in its mechanic's lien prior to judgment once the correct description is divulged by Springfield. *Id.* Although Pittsburg addressed this rule of law in its Answer, Springfield did not acknowledge or respond to this in its Brief.

No judgment has been entered in this case, therefore a Motion for Leave to Amend its Mechanic's Lien Petition by Pittsburg would be proper. Once the case is sent back to the trial court, Pittsburg will, if necessary, amend its lien in accordance with the foregoing authorities. There is no harm to Springfield. There is no harm to innocent third parties. The sole harm in this entire procedure would be to allow Springfield to have the benefit of the steel and to avoid paying for the steel fabricated by Pittsburg in good faith and to require Pittsburg to incur a loss as a result of a secret survey by Springfield.

### **CONCLUSION**

Springfield's Motion to Dismiss/Motion for Summary Judgment was properly denied by the trial court. None of the arguments Springfield raised before the trial court supported granting the Motion to Dismiss/Motion for Summary Judgment. Moreover, the denial of the Motion to Dismiss/Motion for Summary Judgment is not a sufficient basis for the extraordinary relief requested in this case. The preliminary Writ of Prohibition thus should be quashed.

WHEREFORE, for the forgoing reasons, Judge Sweeney respectfully requests that this Court 1) deny Springfield's Petition for Writ of Prohibition in its entirety; 2) return this

matter to the trial court for a full trial on the merits; and 3) grant any other relief to Pittsburg that the Court deems just and proper in the premises.

Respectfully submitted,

**MILLER LAW FIRM, P.C.**

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PLAINTIFF**

### **CERTIFICATE OF SERVICE**

The undersigned certifies that the above and foregoing was served on the following persons by mail this 12<sup>th</sup> day of November, 2002:

The Honorable J. Miles Sweeney  
Circuit Judge, Greene County, Missouri  
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**CERTIFICATE OF COMPLIANCE WITH RULE 84.06(c)**

The undersigned hereby certifies that:

- (1) The attached brief includes the information required under rule 55.03 and complies with the limitations contained in Rule 84.06(b). There are 3,200 words in this brief excluding the cover, the signature block, this certification, and any appendix, as determined by the word count of his word processing system in making this certification; and
- (2) The floppy disk, which contains a copy of this brief, filed with this Court has been scanned for viruses and is virus-free; and
- (3) A copy of this brief and a floppy disk containing this brief were mailed, postage prepaid, on November 12, 2002, to Warren E. Harris, Taylor, Stafford Clithero, Fitzgerald & Harris, LLP, 3315 East Ridgeview, Suite 1000, Springfield, Missouri, 65804.

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